Supreme Court, U.S.
FILED
OCT 29 1991
OFFICE OF THE CLERK

(2)

No. 91-572

In The

Supreme Court Of The United States

October Term, 1991

Allright Colorado, Inc.; Continental Airport Parking, Inc.; Ennis, Inc., d/b/a Monaco Parking; Phchodaux Howdy International Group, Inc., d/b/a Premier Parking, Inc.;

Petitioners,

vs.

THE CITY AND COUNTY OF DENVER, a governmental subdivision of the State of Colorado, d/b/a SMART; JOHN MROZEK, in his capacity as Manager of Public Works; GEORGE DOUGHTY, in his capacity as Director of Aviation of Stapleton,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

Respondents' Brief In Opposition

Helen Eckardt Raabe
(Counsel of Record)
Office of the City Attorney
3231 Terminal Building
Stapleton International Airport
Denver, Colorado 80207
(303) 270-1475

October 30, 1991

QUESTIONS PRESENTED FOR REVIEW

I. Whether the actions of respondents the City and County of Denver, Manager of Public Works John Mrozek, and Director of Aviation, George Doughty, in establishing rules and regulations governing ground transportation at Stapleton International Airport, are immune from the antitrust laws by virtue of state action immunity.

II. Whether the Court of Appeals correctly found Denver to be immune from antitrust laws even though Denver's airport operations also include authorized and necessary market activity such as providing parking facilities on airport grounds.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

REASONS WHY THE PETITION SHOULD BE DENIED . 3

I. THE TENTH CIRCUIT CORRECTLY APPLIED THE STATE ACTION IMMUNITY DOCTRINE AND THERE IS NO REASON FOR THIS COURT TO REVIEW THE TENTH CIRCUIT'S RULING 3

II. THIS CASE DOES NOT PRESENT A MEANINGFUL OPPORTUNITY FOR SUPREME COURT CONSIDERATION OF STATE ACTION IMMUNITY BECAUSE THE TRIAL COURT IN THIS CASE HAS ALREADY DENIED PETITIONERS' ANTITRUST CLAIM ON ITS MERITS 7

CONCLUSION 9

TABLE OF AUTHORITIES

CASES **PAGE**

Allright Colorado, Inc. v. City and County of Denver, 937 F.2d 1502 (10th Cir. 1991) 4, 6, 7

City of Columbia v. Omni Outdoor Advertising, Inc., ___ U.S., ___ 111 S.Ct. 1344, 113 L. Ed 2d 382 (1991) . 3, 4, 5

City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) 4

Commuter Transportation System, Inc. v. Hillsborough City Aviation Authority, 801 F.2d 1286 (11th Cir. 1986) 6

Hillman Flying Service, Inc. v. City of Roanoke, 652 F.Supp. 1142 (W.D. Va. 1987), aff'd 846 F.2d 71 (4th Cir. 1988) 6

Independent Taxicab Drivers' Employees v. Greater Houston Transp. Co., 760 F.2d 607 *(5th Cir. 1985) cert. denied* 474 U.S. 903 6

Interface Group, Inc. v. Mass. Port Authority, 816 F.2d 9 (1st Cir. 1987) 6

Montauk-Caribbean Airways, Inc. v. Hope, 784 F.2d 91 (2d Cir. 1986) *cert. denied* 479 U.S. 872 6

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) 5

STATUTES

Colo. Rev. Stat. § 31-15-711(f) 6

Colo. Rev. Stat. § 41-1-101 6

Colo. Rev. Stat. § 41-3-103(2) 5, 7

Colo. Rev. Stat. § 41-4-101 . . . . . 5, 8

Colo. Rev. Stat. § 41-4-106 5

OTHER AUTHORITIES

Federal Rule of Civil Procedure 41(b) 2

No. 91-572

In The

Supreme Court Of The United States

October Term, 1991

o

Allright Colorado, Inc.; Continental Airport Parking, Inc.; Ennis, Inc., d/b/a Monaco Parking; Phchodaux Howdy International Group, Inc., d/b/a Premier Parking, Inc.;

Petitioners,

vs.

THE CITY AND COUNTY OF DENVER, a governmental subdivision of the State of Colorado, d/b/a SMART; JOHN MROZEK, in his capacity as Manager of Public Works; GEORGE DOUGHTY, in his capacity as Director of Aviation of Stapleton,

Respondents.

o

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

o

Respondents' Brief In Opposition

o

STATEMENT OF THE CASE

Respondent the City and County of Denver owns and operates a municipal airport known as Stapleton International Airport. Respondents the City and County of Denver, John Mrozek as Manager of Public Works, and George Doughty as Director of Aviation, will hereinafter be referred to collectively as "Denver". The petitioners are operators of private shuttle bus parking lots located near the Airport.

Petitioners filed a Complaint in the United States District Court alleging that Denver violated the antitrust laws in its operation of Stapleton International Airport. A trial was held in November of 1989 and at the close of plaintiffs' case, the District Court ruled in Denver's favor and granted Denver's Motion for Dismissal under Rule 41(b) of the Federal Rules of Civil Procedure.

The District Court first found that Denver was not immune from antitrust laws, a ruling that the Tenth Circuit corrected in its decision on appeal. The District Court then held a trial on the merits of petitioners' antitrust claim, and found on the evidence that petitioners failed to establish either an attempt to monopolize, an actual monopoly, monopoly power, or a dangerous probability of success in establishing a monopoly in the future. In other words, the District Court has already found no violation of Section 2 of the Sherman Act in a trial, yet petitioners still wish this Court to grant certiorari to review the threshold question of state action immunity.

The petitioners' statement of facts states that the Tenth Circuit set forth instances "where Denver has used its governmental power to hinder its private competitors in its attempt to monopolize a market in which it is now the leading participant." (Petition at 4).

For the petitioners to present this as a statement of fact is incorrect, because the actual findings by the trial court at trial were that there was no specific intent to monopolize and no sufficient evidence that Denver attempted to monopolize the market within the meaning of the antitrust laws. (Petition App. at 36-37).

In making its ruling on the merits, the trial court also found that public parking at the Airport was necessary to the operation of the Airport. (Petition App. at 29). The trial court also found that Denver's shuttle bus system was used for more than just shuttle lot parking; that it was also used to transport persons from one concourse to another, including the remote concourses. (Petition App. at 42).

The Circuit Court of Appeals for the Tenth Circuit affirmed the ruling of the trial court, but did so on the basis that the trial court should have granted state action immunity to Denver. The Court of Appeals held that state action immunity applied and that Denver was not subject to the antitrust laws in its operation of the Airport.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE TENTH CIRCUIT CORRECTLY APPLIED THE STATE ACTION IMMUNITY DOCTRINE AND THERE IS NO REASON FOR THIS COURT TO REVIEW THE TENTH CIRCUIT'S RULING.

The Tenth Circuit's decision correctly applied the state action immunity doctrine in accordance with settled rulings of this Court and in a manner consistent with all other Circuit Courts of Appeals.

Denver's action which formed the basis for petitioners' Complaint was the adoption of Rules and Regulations governing ground transportation at Stapleton International Airport. In particular, those Rules and Regulations increased the fee which petitioners' shuttle buses were charged. The petitioners requested an injunction under the antitrust laws to prohibit the Airport from charging a fee of 42 cents for a 15-minute stay by petitioner's shuttle buses in the passenger pick-up area at the Airport. (Petition App. at 31).

The Airport's Rules and Regulations for ground transportation assess fees against various commercial ground transportation users, including petitioners, regulate the traffic flow and locations for pick-up, and generally require that appropriate permits or concession agreements be obtained by all commercial ground transportation users. (Petition App. at 32, 45).

In establishing such fees and permit requirements, the Airport is engaged in regulating ground transportation at the Airport. It is acting in a regulatory capacity and is not acting as a private market participant. Petitioners do not dispute the Tenth Circuit's holding that application of this Court's well-established standards for state action immunity result in immunity for Denver in this case. Rather, the essence of petitioners' argument is that since the Airport is a market participant in providing necessary shuttle parking at the Airport, the established state action immunity test should not be used - a new standard should be created - and the Airport's regulation of ground transportation users should be subject to the antitrust laws.

Petitioners cite *City of Columbia v. Omni Outdoor Advertising, Inc.*, ___ U.S. ___, 111 S.Ct. 1344, 113 L. Ed 2d 382 (1991) in support of this claim. However, the language in that case to which petitioners cite is completely misread by petitioners. The language in *City of Columbia,* which is dicta, implies that state action immunity might not obtain where the City is *"not acting in a regulatory capacity"*, but only as a market participant. 111 S.Ct. at 1351 (emphasis added). In this case, the

Airport was without question acting in a regulatory capacity and petitioners were clearly attempting to enjoin Airport regulations, not market conduct.

As explained correctly by the Tenth Circuit in its ruling:

> The fact that the City is also in some sense a competitor of plaintiffs does not alter the basic test for state action immunity nor does it diminish the City's regulatory authority over the Airport and plaintiffs' activities.

Allright Colorado, Inc., 937 F.2d 1502, 1510 (Petition App. at 20).

Justice Scalia's suggestion must also be placed in the context of the case in which it arose - a Section 1 conspiracy claim. Under *City of Columbia* read as a whole, an exception to immunity might obtain only where a municipality was 1) not acting in an authorized regulatory capacity, *and* 2) alleged to be conspiring with a private entity under Section 1 of the Sherman Act. Far from creating a possible new exception to state action immunity, as petitioners claim, *City of Columbia* was instead reconstructing and narrowing the scope of what was formerly known as a possible "conspiracy" exception.

Also as noted correctly in the Petition itself, the language in *City of Columbia* is only a suggestion, not a rule of law or doctrine that has ever been applied in any case. (Petition at 7). The suggestion was duly noted by the Tenth Circuit in this case and properly disregarded as inapplicable. *Allright Colorado, Inc.*, 937 F.2d 1502, 1510 (Petition App. 20).

The Tenth Circuit held that under this Court's decisions since *City of Lafayette v. Louisiana Power & Light*, 435 U.S. 389 (1978), the focus of inquiry for antitrust immunity has always been whether a local government is acting pursuant to a "clearly articulated and affirmatively expressed" state policy, and whether anticompetitive restraint is a foreseeable result of what the statute authorizes.

The state legislation which authorizes Denver to own and operate the Airport is extensive, specific, and replete with language authorizing the particular actions by Denver which are complained of here. To begin with, the statutory definition of "airport" itself includes authorization to own land, buildings, and facilities . . .

> together with all appurtenances necessary or convenient thereto for the accommodation of convenience of the public, whether or not the members of the public so accommodated are directly or indirectly engaged in transportation by air, including, but not limited to, parking, dining, recreational, and hotel facilities.

Colo. Rev. Stat. 41-3-103(2).

The state statutes further provide that:

> the acquisition of any lands for the purpose of establishing airports or other air navigation facilities . . . ; the acquisition, establishment, construction, enlargement, improvement, maintenance, equipment, and operation of airports . . . ; and the exercise of any other powers granted in this part I to any county, city and county, city . . . are hereby declared to be public governmental functions, exercised for a public purpose, and matters of public necessity . . .

Colo. Rev. Stat. 41-4-101.

Finally, and perhaps most significantly, the statutes provide that any county operating an airport has the express authority:

> to regulate the receipt, deposit, and removal and the embarkation of passengers or property to or from such airport; to exact and require charges, fees, and tolls . . . ; to lease or assign for operation such space or area, appurtenances, appliances, or other conveniences necessary or useful in connection therewith; to own and operate aircraft, to employ pilots; to provide rules and regulations governing the use of such airport and facilities and the use of other property and means of transportation within or over said airport . . .

Colo. Rev. Stat. 41-4-106.

This Court in *Town of Hallie v. City of Eau Claire,* 417 U.S. 34 (1985) as well as *City of Columbia,* further clarified the application of state action immunity to actions taken by local governments. This Court held that local governments are entitled to state action immunity when their activities are authorized by the state. In various cases such as *Hallie* and *City of Columbia,* this Court has uniformly rejected arguments that the state must compel the activity, that the state must actively supervise the activity, that the anticompetitive conduct must be expressly mentioned in the legislation, or that the court should examine the subjective motives of the municipality in determining whether immunity attaches.

Petitioners' entire claim is based on their status as competitors of the City in the operation of parking lots. However, in addition to the express inclusion of authority to conduct parking as part of an airport operation (Colo. Rev. Stat. 41-3-103(2) cited above), other state legislation also specifically authorizes municipalities to:

> provide by ordinance for the construction, maintenance and operation of public parking facilities, buildings, stations, or lots . . .
>
> Colo. Rev. Stat. 31-15-711(f).

Ownership and operation of a municipal parking lot automatically places the City in a "competitive position" with private parking lot companies; thus the legislature must have foreseen and intended the possible anticompetitive effect of allowing municipalities to enter the parking market. Similarly, when the legislature in Colo. Rev. Stat 41-1-101 et. seq. authorized municipalities operating airports to also own "parking, dining, recreational, and hotel facilities" in connection with the airport, and to own aircraft and employ pilots in connection with the airport, it is axiomatic that the legislature contemplated the potential anticompetitive or monopoly impacts of allowing government to enter these ancillary markets, especially in connection with a city government's operation of an airport, which is often a natural monopoly in that municipality already.

As summarized in the Tenth Circuit's opinion, 937 F.2d 1502, 1508 (Petition App. at 16-17), other recent Courts of Appeals have uniformly held airport authorities immune from antitrust laws where state statutes authorize them to regulate access to and use of the airport property and facilities. See *Interface Group, Inc. v. Mass. Port Authority,* 816 F.2d 9 (1st Cir. 1987) (Authority operating Logan Airport is immune where state has clearly authorized the activities in question); *Commuter Transportation System, Inc. v. Hillsborough City Aviation Authority,* 801 F.2d 1286 (11th Cir. 1986) (Authority's actions in regulating number of contracts with limousine companies were contemplated by the state legislature and are immune from antitrust scrutiny); *Montauk-Caribbean Airways, Inc. v. Hope,* 784 F.2d 91 (2d Cir. 1986), *cert. denied* 479 U.S. 872 (broad statutory authority to enter into contracts resulted in immunity for Town's actions in denying year-long rights to a charter airline); *Independent Taxicab Drivers' Employees v. Greater Houston Transp. Co.,* 760 F.2d 607 (5th Cir. 1985), *cert. denied* 474 U.S. 903 (municipal airport authority's actions in restricting number of taxicab companies was exempt from Sherman Act even though broad statutory authority did not expressly mention ground transportation); *Hillman Flying Service, Inc. v. City of Roanoke,* 652 F.Supp. 1142 (W.D. Va. 1987), aff'd. 846 F.2d 71 (4th Cir. 1988) (statutory authority to "acquire, construct, maintain, and operate airports and related structures, properties and facilities" resulted in immunity for actions of City in granting an exclusive right to sell aviation fuel).

There is thus no split or conflict in the Courts of Appeals on this issue.

The Tenth Circuit properly ruled that Denver is immune from antitrust laws in its operation of the airport and regulation of ground transportation thereon, whether or not the Airport's operations also include authorized and necessary market activity at the Airport such as parking. Therefore, there is no reason for this Court to reexamine the Tenth Circuit's application of the state action immunity doctrine in this case.

II. THIS CASE DOES NOT PRESENT A MEANINGFUL OPPORTUNITY FOR SUPREME COURT CONSIDERATION OF STATE ACTION IMMUNITY BECAUSE THE TRIAL COURT IN THIS CASE HAS ALREADY DENIED PETITIONERS' ANTITRUST CLAIM ON ITS MERITS.

Rather than posing a serious issue concerning this Court's standard for state action immunity, the petitioners pull a suggestion from dicta in one recent opinion, misread and misapply that suggestion, and then ask this Court to clarify the suggestion in a case where the entire state action immunity issue is moot because the trial court has already denied petitioners' claim on the merits.

As noted by the Tenth Circuit, the trial court has already ruled that the petitioners:

> failed to establish that there was a dangerous probability of success in monopolizing the relevant market and that defendants had a specific intent to monopolize. Plaintiffs' attempt to monopolize claim was therefore dismissed. The court held that plaintiffs' monopolization claim failed apparently because plaintiffs failed to prove monopoly power.

Allright Colorado, Inc., 937 F.2d 1502 (Petition App. at 7).

There was ample evidence from petitioners' own testimony which supported these findings. For example, the Airport's share of the market (45%) did not itself establish monopoly power, and the petitioners offered no expert testimony at trial that Denver had either a monopoly or monopoly power. (Record, Tr. at 345-351). The evidence established that there were no entry barriers in the market and that there is healthy competition. (Record,Tr. at 31-34, 355). The testimony indicated that the Airport did not dictate prices, that the plaintiffs' prices were set by what the market would bear, and that plaintiffs would not necessarily increase their prices as a result of the Airport's fee. (Record, Tr. at 21-22, 42-45, 88, 346, and 356-57). The District Court

held that the plaintiffs' own evidence established that there was no monopoly, no dangerous probability of a monopoly succeeding, and no intent on the part of Denver to establish a monopoly.

Therefore, the petitioners are asking this Court to grant a writ of certiorari, change settled law which has been established by this Court in the last ten years and which this Court has just reconfirmed in 1991, and send this case back to the Court of Appeals only to have the Court of Appeals reaffirm the trial court on the merits. Therefore, this case does not offer a meaningful opportunity for this Court to readdress state action immunity.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

Helen Eckardt Raabe
(Counsel of Record)

Office of the City Attorney
Room 3231
Stapleton International Airport
Denver, Colorado 80207
(303) 270-1475

Counsel for Respondents
The City and County of Denver,
John Mrozek, as Manager of
Public Works, and
George Doughty, as Director
of Aviation